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No. 90-26

In The

Supreme Court of the United States

October Term, 1990

MICHAEL BARNES, Prosecuting Attorney of St. Joseph County, Indiana, et al.,

Petitioners,

v.

GLEN THEATRE, INC., et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF THE GEORGIA ON PREMISE & LOUNGE ASSOCIATION, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether striptease dancing or nude performance dancing is a form of expression protected by the First Amendment.

2. Whether the state may constitutionally apply its criminal public indecency statute to such expression.

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INTEREST OF AMICUS CURIAE

The Georgia On Premise & Lounge Association, Inc. is a trade association, organized in 1986 under the laws of the State of Georgia. The Association's members are entertainment businesses in Georgia, primarily nightclubs, that offer live stage entertainment, including comedy acts, striptease acts, and nude performance dance routines set to contemporary music. Association members have provided this type of nightclub entertainment to thousands of adult patrons.

The national media have reported on the entertainment presented at Association members' nightclubs. *See*, Wall Street Journal, July 15, 1988, at 1; Washington Times, May 18, 1988, at E1. The editorial page of The Atlanta Constitution remarked that "[n]ude dancing isn't everybody's idea of good entertainment . . . [b]ut the practice is long-established and widely enjoyed in Atlanta and the nude dancing here is among the nation's tamest. . . . The better-run clubs are an important adjunct to the city's vital convention trade. . . ." Atlanta Constitution, December 25, 1987 at 22-A.

In 1989 one of the Association's members challenged the constitutionality of a newly-passed Georgia statute (1988 Ga. Laws 212) which, among other things, prohibited nude dance entertainment on premises where alcoholic beverages were sold or dispensed. Ultimately, the Georgia Supreme Court in *Harris v. Entertainment Systems, Inc.*, 386 S.E.2d 140 (Ga. 1989), invalidated the Act on overbreadth grounds because it infringed upon the free speech protections of the Georgia Constitution.

The Georgia Supreme Court's ruling allowed Association members to continue presentation of nude dance performances for adult patrons. Hence, the Association, its members and their patrons are keenly interested in the present litigation.

For these reasons, the Association submits this brief *amicus curiae* to assist the Court in its resolution of this case. Letters of consent to appear *amicus curiae* have been received from the attorneys for the State of Indiana and the respondents.

SUMMARY OF ARGUMENT

In *State v. Baysinger*, 272 Ind. 236, 397 N.E.2d 580 (1979), *appeals dismissed sub nom., Clark v. State*, 446 U.S. 931 (1979) and *Dove v. State*, 449 U.S. 806 (1980), the Indiana Supreme Court upheld the constitutionality of the state public indecency statute, Ind. Code § 35-45-4-1, concluding that it was not overbroad even though it could be enforced against nude dance entertainment. The court found nude dancing generally, as well as the particular performances there, to be devoid of expression such that the statute did not infringe on protected activity.

Some six years later the issue of First Amendment protection for nude dance performances in Indiana was raised anew, but in federal district court. Following a series of appeals and remands, a majority of the Court of Appeals for the Seventh Circuit, sitting *en banc*, concluded that the nude dance or striptease routines performed by respondents Gayle Sutro, Darlene Miller and Carla Johnson did express ideas protected under the First

Amendment, even though their presentations differed from more mainstream forms of dance. *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1087 (7th Cir. 1990).

The Court of Appeals decision was supported by prior decisions of this Court. In *Schad v. Mt. Ephraim*, 452 U.S. 61 (1981), adult bookstore owners presenting live nude dance entertainment challenged a municipal zoning ordinance that, by interpretation, banned all live entertainment in the community. The Court declared the ordinance unconstitutionally overbroad, partly because it prohibited nude dance performances entitled to First Amendment protection. *Schad*, as well as other opinions from this Court, intimated that performances of this type express ideas and emotions to an extent warranting constitutional protection.

The court in *Baysinger* could find none of the expressive elements of dance in the performances it reviewed. Here, however, the Court of Appeals did find communicative elements, such as emotional theme, the presence of an audience, musical accompaniment, and stylized movement in the respondents' dance routines. Those findings were well-supported in the record. Moreover, the history of nudity in contemporary dance, as well as striptease dance, demonstrates that both are legitimate expressive traditions which, like other forms of entertainment, qualify for First Amendment protection.

While respondents' performances were graded to be inferior in artistic and aesthetic quality, when compared to classical ballet, the Court of Appeals rightly avoided deciding the constitutional issue according to matters of taste or style. *Cohen v. California*, 403 U.S. 15, 25 (1971).

The state contends nonetheless that respondents' dances fall outside the concept of "speech" and constitute essentially thoughtless "conduct" unworthy of constitutional protection. To make this argument, the state resorts to an analysis based upon this Court's political speech cases. *E.g., Texas v. Johnson*, ___ U.S. ___, 109 S.Ct. 2533 (1989). But the determination as to whether a non-obscene painting, photograph, play, musical composition, or a dance performance is constitutionally protected from criminal prosecution based on concepts of indecency should not depend on whether the work is characterized by some "particularized message" or by a requirement that the message be understood by the audience. The use of such a test to measure whether artistic works fall within the First Amendment's reach would be both unworkable and absurd, especially given the non-programmatic and non-representational aspects of many works of art.

Nonetheless, if it is assumed that such criteria are appropriate to determine when artistic performances qualify for First Amendment protection, respondents' non-obscene dance routines sufficiently communicated themes of eroticism and sensuality that would be understood by their audiences.

Since respondents' dance performances were sufficiently communicative of ideas, the *Baysinger* decision would suggest that the state "may be constitutionally required to tolerate or to allow" these particular performances. 397 N.E.2d at 587. However, the state offers several reasons why the statute could be enforced constitutionally against the respondents. The state's claims are without merit, however, because the Indiana public indecency statute, as interpreted in *Baysinger*, is not a content-

neutral statute. Moreover, the state has failed to identify any substantial governmental interest, unrelated to the suppression of free expression, which would justify the enforcement of the statute against these types of dance performances. Indeed, the scope of the statute, as interpreted in *Baysinger*, betrays a governmental intent to censor erotica, rather than promote some substantial governmental interest. The statute's ban on nudity is not a reasonable "time, place and manner" restriction because it prohibits expressive nude dance performances in all settings under all circumstances throughout the State of Indiana.

ARGUMENT

I. NUDE DANCE ENTERTAINMENT IS A FORM OF EXPRESSION PROTECTED BY THE FIRST AMENDMENT.

The question of whether nude dance entertainment is a protected form of expression under the First Amendment was addressed by this Court in *Schad v. Mt. Ephraim*, 452 U.S. 61 (1981). The Court reviewed a city zoning ordinance that prohibited all live entertainment. The petitioners were adult bookstore owners who challenged the zoning ordinance on overbreadth grounds. The bookstore establishment offered patrons the opportunity to view live nude dance entertainment under circumstances much like those involving petitioner Gayle Sutro. *See Glen Theatre, Inc. v. Civil City of South Bend*, 695 F. Supp. 414, 419 (N.D. Ind. 1988) (Findings of Fact, Appendix A).

In discussing the overbreadth issue, this Court declared that Mt. Ephraim's total ban on all live entertainment reached "non-obscene nude dancing that is otherwise protected by the First Amendment." *Schad*, 452 U.S. at 76. Necessarily central to the Court's overbreadth ruling was its finding that the ordinance infringed upon some form of protected speech or expression. The Court listed several forms of entertainment that were constitutionally protected *and expressly included nude dancing*. "[N]ude dancing is not without its First Amendment protections from official regulation." *Id.* at 66. The majority opinion concluded further that the municipality's interests in banning nude dance were entirely speculative; there was no justification on the record for excluding "even the nude dancing involved in this case." *Id.* at 73 n.15. Accordingly, the Court was not just concerned about the potential application of the ordinance to nudity in ballet; rather, the Court was convinced that the ordinance was unconstitutional in scope because it could be applied to nude "barroom" dancing, as petitioners have labeled the variety at issue here.

Earlier decisions from the Court, although perhaps less clear, support the same proposition. In *California v. LaRue*, 409 U.S. 109, 118 (1972), then-Justice Rehnquist, writing the majority opinion, recognized that "some of the performances to which these regulations addressed themselves [which included nude dance performances] are within the limits of the constitutional protection of freedom of expression. . . . " In *Doran v. Salem Inn*, 422 U.S. 922, 932 (1975), Justice Rehnquist declared that "[a]lthough the customary 'barroom' type of nude dancing may involve only the barest minimum of protected

expression, . . . this form of entertainment might be entitled to First and Fourteenth Amendment protection in some circumstances."

More recently, individual Justices have recognized the constitutionally protected nature of nude dance performances. Justice White, joined by Justice Brennan, dissented to a denial of certiorari in *Young v. Arkansas*, 474 U.S. 1070, 1072 (1985), stating that this Court had given "repeated indications that barroom-type nude dancing is a type of expression that is protected under the First Amendment under some circumstances." Justices Marshall and Stevens joined Justice Brennan in dissent in *Massachusetts v. Oakes*, ___ U.S. ___, 109 S.Ct. 2633, 2642 (1989), and declared that *Schad* had afforded nude dancing protection under the First Amendment. Justice O'Connor, as part of a three-justice plurality in *FW/PBS, d/b/a Paris Adult Book Store II v. City of Dallas*, ___ U.S. ___, 110 S.Ct. 596, 604 (1990), noted that certain types of businesses are protected by the First Amendment, expressly including as an example the "nude dancing" business earlier reviewed in *Schad*.

Given the consistency of these declarations about the constitutionally protected character of nude dance entertainment, it is not surprising that numerous federal appellate courts and district courts have reached the same conclusion with specific references to nude barroom-type dancing. *See, e.g., International Food & Beverage System v. Fort Lauderdale*, 794 F.2d 1520, 1525 (11th Cir. 1986); *Leverett v. City of Pensacola*, 775 F.2d 1536, 1540 (11th Cir. 1985); *Krueger v. City of Pensacola*, 759 F.2d 851, 854 (11th Cir. 1985); *Kev, Inc. v. Kitsap County*, 793 F.2d 1053, 1058 (9th Cir. 1986); *BSA, Inc. v. King County*, 804

F.2d 1104, 1107 (9th Cir. 1986); *Walker v. City of Kansas City, Mo.*, 691 F. Supp. 1243, 1249 (W.D. Mo. 1988); *Doe v. City of Minneapolis*, 693 F. Supp. 774, 779 n.12 (D. Minn. 1988); *Function Junction, Inc. v. City of Daytona Beach*, 705 F. Supp. 544, 550 (M.D. Fla. 1987); *Tolbert v. City of Memphis, Tenn.*, 568 F. Supp. 1285, 1292-93 (W.D. Tenn. 1983); *Atwood v. Purcell*, 402 F. Supp. 231, 234 (D. Ariz. 1975).

Several state appellate courts have reached the same conclusion when interpreting the free speech provisions of their own constitutions. *E.g., Sekne v. City of Portland*, 81 Or. App. 630, 726 P.2d 959, 963 (1986); *Cabaret Entertainment v. Alcoholic Bev. Control Comm.*, 393 Mass. 13, 468 N.E.2d 612, 614 (1984); *Mickens v. City of Kodiak*, 640 P.2d 818, 820 (Alaska 1982); *Commonwealth v. Sees*, 374 Mass. 532, 373 N.E.2d 1151, 1155 (1978).

These pronouncements regarding the protected character of nude dance entertainment, germinate from the fairly self-evident observation that dance itself is a form of expression. The Seventh Circuit majority so noted: "Dance as entertainment is one of the earliest forms of expression known to man. . . . Inherently, it is the communication of emotions or ideas." *Miller v. Civil City of South Bend*, 904 F.2d at 1085. "[T]he basic appeal [of dance] remains the same – the transmission of a state of awe and excitement (whether exhilarating, emotionally moving or simply esthetic) from performer to spectator." Bland, *A History of Ballet and Dance in the Western World* at 11 (1976).

The recognition that dance is a form of expression, however, has not been limited to classical ballet, musical

theater dance, contemporary jazz dance, or other similar dance forms. Nudity and dance, combined to form nude dance performance, are recognized as legitimate, expressive traditions as well. Walter Sorrell, a noted dance historian, has stated:

> A mingling of the first major attack of anxiety with a newly experienced sensation of freedom led to a general trend toward nudity in the 1920's. Sometimes it can be a romantic gesture to show oneself in one's native beauty with emphasis on the body's movement,. . . . In 1929, in her revolutionary spirit, Helen Tamiris strongly believed in dance as the purest art form and experimented with the aesthetically valid notion that the dancer's body should communicate without the costumes. . . .
>
> A certain fascination with nudity in the twenties reappeared in the sixties. . . . It became a habitual sight on stage in plays and modern dance works.

Sorrell, *Dance In Its Time* at 425-428 (1981).

In contemporary American dance, Isadora Duncan is said to have led the way, being a great believer in nudity on stage. Cheshire, "Eroticism in the Performing Arts," in Webb (ed.), *The Erotic Arts* at 300-301 (1983). Duncan herself wrote:

> The noblest in art is the nude. This truth is recognized by all, and followed by painters, sculptors and poets; only the dancer has forgotten it, who should most remember it, as the instrument of her art is the human body itself.
>
> Man's first conception of beauty is gained from the form and symmetry of the human body. The new school of the dance should begin with that

> movement which is in harmony with and will develop the highest form of the human body.

Duncan, "The Art Of Dance", in Steinberg, *The Dance Anthology* at 38-39 (1980).

In the context of music hall or barroom entertainment, nudity combined with dance may have first gotten its start as part of the can-can. "This dance, most famous at the Folies Bergere, is said to have been the first dance to exploit nudity. . . . " Sobel, *A Pictorial History of Burlesque* at 41 (1956). Full nudity on stage appeared in the 1920's, when stage production numbers featured nude figures on chandeliers, as tassels on "living" curtains, and even as ingredients in a large fruit basket. In 1923 an additional step was taken in the production, "Artists And Models," where nude or semi-nude showgirls moved about on stage. Up until this time, nude figures had been permitted only if they were immobile. Laufe, *The Wicked Stage: The History of Theater Censorship and Harassment in the United States* at 47, 50 (1978). Later, with developments in burlesque and contemporary dance, nudity in dance has become a recognized entertainment form, with stylized costuming, distinctive musical accompaniments, and specific routines and dance techniques. *See generally*, Laufe, *supra*, at 19-107; Corio, *This Was Burlesque* at 8-78 (1968); and Zeidman, *The American Burlesque Show* at 136-160 (1967).

Common to these dance forms involving nudity and sexual suggestiveness is the communicative element. The very signs of communication that are found in ballet and contemporary dance (such as presentation before an

audience, musical accompaniment and stylized movement), are found, as well, though often in less sophisticated fashion, in nude dance performances.

The nudity itself is central to that communication. A majority of the Court of Appeals for the Seventh Circuit understood that communication and characterized it as "an emotional one; it is one of eroticism and sensuality." *Miller*, 904 F.2d at 1086-1087. Judge Cudahy agreed: "It is a message of temptation and allurement coupled with coy hints at satisfaction." *Id.* at 1089 (Cudahy, J., concurring). Judge Posner also concurred: "Erotic dances express erotic emotions, such as sexual excitement and longing." *Id.* at 1091 (Posner, J., concurring).

The presence of an audience is essential to this communication. Those in the audience are present not by compulsion or coincidence, but in anticipation of the emotional or sensual message. They pay to see the performers, to hear the music and to revel in the message – concrete evidence that nude or striptease dancing is an accepted form of expression.[1]

---

[1] In the past the audience was comprised mostly of men – from all stations of life. Justice Oliver Wendell Homes reportedly was a patron of the burlesque presented at the Gayety Theater in Washington, D.C. Corio, A., *This Was Burlesque* at 144.

Nude dance and striptease is no longer limited to women performers dancing before male audiences. The roles have been reversed in many entertainment clubs featuring male dancers and female audiences. *See* Smith, *Nudity, Obscenity and Pornography: The Streetcars Named Lust and Desire*, 4 J. of Contemp. Health L. and Policy 155, 161 (1988).

Another ingredient that adds to the expressive character of nude dance or striptease is the musical accompaniment. Judge Posner described the importance of music to nude dance: "[T]he dancing and the music are not distractions from the main theme, patched on to fool the censors; they are what make a given female body expressive of a specifically sexual emotion. Striptease is the ensemble of the music, the dance, the disrobing, and the nude end state. . . . " *Miller*, 904 F.2d at 1092 (Posner, J., concurring). The same relationship exists in other contemporary dance. "The relationship of dance to music is an intimate one. Music, through its pulse and rhythm, provides a driving force and an overall structure. . . . " Blom, *The Intimate Act Of Choreography* at 162 (1982).

Nude dance performances and striptease dances also have a choreography. Part of the emphasis can be traced to the choreography of the can-can: "The dance itself had a classic origin, its principal intention being to agitate some part of the female anatomy for the edification of the audience." Sobel, *supra*, at 40-41. Another stylized movement in striptease or nude dance is the "hootchy-kootchy", given notoriety by the famous dancer, Little Eqypt. "When she dances, every fiber and every tissue in her entire anatomy shakes. . . . " *Id.* at 57, 59.

> [The] appeal [of striptease] lies not only in the piquant suggestiveness of a female undressing knowingly while men are watching, but the gestures, winks and cooch movements – the modus operandi – that are essentially a part of it.

Zeidman, *supra*, at 136.

The striptease and nude dancing in this very case are but continuations of set routines.

> [T]he art of undressing became a ceremony with a special technique and nomenclature. The number itself was a combination of posing, strutting, dancing and singing punctuated from time to time by thrusts and twists of the abdomen called "bumps" and "grinds."

Sobel, *supra*, at 127.

To the extent that the nude dance performances of today incorporate improvisation, the routines still are expressive and communicative, just as improvised contemporary dance is.

> [Isadora Duncan] believed that dance should not be the repetition of ready-made steps. It should be free. It should express the feelings and ideas of human beings. It should forget its traditions and roam freely where it will, barefooted for the sake of control and in order to display the beauty of the foot, naked or near-naked to extol the body.

Marks, *A Pictorial History Of The Dance* at 93.

Respondents recognize that nude or semi-nude dancing does not appeal to everyone's sense of artistic expression or pleasure. Differences in artistic tastes, whether in dance, theater, music or food, and the allowance for such differences is one of the cornerstones of American democracy. Some people like ballet and caviar; in Georgia some people like clogging and cornbread. The latter is no less artistic for its simplicity or provincial nature.

Justice Harlan in *Cohen v. California*, 403 U.S. 15, 25 (1971), writing for a majority of the Court, spoke eloquently to this point:

> [I]t is . . . often true that one man's vulgarity is another's lyric. Indeed, we think it is largely

> because governmental officials cannot make principled distinctions in this area that the constitution leaves matters of taste and style so largely to the individual.

Justice Harlan's point was reiterated in a nude dancing case, *Salem Inn, Inc. v. Frank*, 501 F.2d 18, 21 n.3 (2d Cir. 1974), *on remand*, 522 F.2d 1045, 1048 (2d Cir. 1975):

> [W]hile the entertainment afforded by a nude ballet at Lincoln Center to those who can pay the price may differ vastly in content (as viewed by judges) or in quality (as viewed by critics), it may not differ in substance from the dance viewed by the person who, having worked overtime for the necessary wherewithal wants some "entertainment" with his beer or shot of rye.

Accordingly, while some will always argue that striptease and nude dance performances are tasteless or vulgar, the plain fact is that they are genuinely expressive, carrying many of the same attributes as other forms of dance.

II. THE PARTICULAR NUDE DANCE PERFORMANCES IN THIS CASE ARE ENTITLED TO FIRST AMENDMENT PROTECTION.

Petitioners conceded from the very beginnings of these cases that the dance performances at issue were not obscene. *Glen Theatre v. Civil City of South Bend*, 726 F. Supp. 728, 731 n.3 (N.D. Ind. 1985). *See also, Miller v. Civil City of South Bend*, 887 F.2d 826, 829 n.3 (7th Cir. 1989).

Despite these concessions, the state argues that the performances by respondents Sutro, Miller and Johnson are not protected by the First Amendment because the performances have no expressive content and therefore

do not constitute "speech," relying on this Court's political speech cases. *See, e.g., United States v. Eichman*, 110 S.Ct. 2404 (1990); *Texas v. Johnson*, 109 S. Ct. 2533 (1989); *Spence v. Washington*, 418 U.S. 405 (1974); *Stromberg v. California*, 283 U.S. 539 (1931).

The footing for the State's entire argument, (that political speech criteria should be applied to dance entertainment or performances) is tenuous at best. First, none of the discussions regarding the protected nature of dance entertainment, and particularly nude dance, referred to such a compartmentalized constitutional test for separating conduct from speech. *E.g., Schad*, 452 U.S. at 66; *Doran*, 422 U.S. at 932-933; *La Rue*, 409 U.S. at 117. Instead, the Court has recognized the expressive nature of such performances as rather self-evident.

The dance performances described in *Doran* and *Schad* are virtually identical to the performances in this case. The expressive nature of the activity is so obvious, especially when it occurs on stage, that it becomes pointless to use the criteria that are more appropriately applied to political speech issues.

Recently, in *Ward v. Rock Against Racism*, ___ U.S. ___, 109 S. Ct. 2746 (1989), the Court applied First Amendment considerations to musical performances. "Music, as a form of expression and communication, is protected under the First Amendment." *Rock Against Racism*, 109 S. Ct. at 2753. To reach this conclusion the Court did not first resort to a three-part test, as derived by petitioners from *Texas v. Johnson*. (Pet. Brief, at 9). There was no assessment of whether the musical performances were characterized by any (1) intent to convey

(2) some particularized message with (3) a great likelihood that the message would be understood by listeners.

The petitioners' straight-jacket approach, in which all expressive conduct must pass each internal component of a political speech test, is both unworkable and absurd. For one, it was obvious from the rock concert setting in *Rock Against Racism* that the musical groups had an intent to communicate. On the other hand, it is doubtful that each musical performance conveyed a "particularized message."

The prospect of gauging constitutional protection for paintings, photography, drama, music or dance performances under the criteria discussed in *Texas v. Johnson* would be frightening to innumerable artists, playwrights, musical composers, and choreographers; for it is often the case that there is no "particularized message" to art or entertainment;[2] and even when there is an intended

---

[2] In the post-modern art of today many artists not only reject the idea of communicating a particular message, they even defy the notion that their work must have artistic value. Note, *Post-Modern Art and the Death of Obscenity Law*, 99 Yale L. J. 1359, 1365-1375 (1990).

Judge Posner, in his concurrence noted:

> The notion that all art worthy of the name has a "message" is Philistine, and leads to the weird conclusion that non-representational art and non-programmatic, non-vocal music are entitled to less protection under the First Amendment than striptease dancing because the latter has a more distinct, articulable message.

904 F.2d at 1094 (Posner, J., concurring).

theme or message, it is often lost on the audience. The audience, particularly in modern dance, often may not grasp the meaning. The premiere of Stravinsky's *Rite Of Spring (Le Sacre du Printemps)*, choreographed by Nijinsky, is a classic example. Sorrell, *supra*, at 370.

Nonetheless, if it is assumed that criteria such as those found in *Texas v. Johnson* form an appropriate measure for the expressive character and communicative content of the dance performances in this case, respondents' dance routines would pass the test. A majority on the Court of Appeals generally categorized respondents' routines as "non-obscene nude dancing of the barroom variety, performed as entertainment." *Miller*, 904 F.2d at 1028. Later, the majority opined that respondent's dances were "of inferior artistic and aesthetic quality as contrasted with a classic ballet such as the Dance of the Seven Veils in Strauss' *Salome*. . . . *Id.* at 1087. The Court found, however, that "the erotic message communicated to the viewers is present in both performances." *Id.* The majority also noted that while respondents' routines may lack a "scripted plot," the lack of such a story line is not determinative.

> The success of both the ballerina in an erotic production and the nude dancer in a barroom setting depend on the communication of their sensual message.

Id.

These descriptions of respondents' dance performances are accurate. Respondents' dance routines presented a dominant theme of "eroticism and sensuality." *Miller*, 904 F.2d at 1086-1087. Certainly there can be no doubt that dancers Sutro, Miller and Johnson intended

that message. The district court noted that Gayle Sutro is a professional actress and stripteaser, having studied acting, dancing, speech and language and having danced and acted professionally for more than 15 years. Sutro's affidavit stated that her nude dances were appropriately choreographed and were an attempt to communicate as well as to entertain. *Glen Theatre*, 695 F. Supp. at 420. While Darlene Miller described her routines in general terms, the videotape exhibits attest to the usual elements of dance including musical accompaniment, and the specific techniques of the striptease, described earlier. It is also apparent that both the majority and dissenting judges of the Seventh Circuit understood the message of these dances.

In sum, the nude dance routines in this case, which the State of Indiana would label as "public indecency," are protected forms of expression, both as a self-evident matter and under the criteria used by this Court in *Texas v. Johnson*.

III. INDIANA'S PUBLIC INDECENCY STATUTE CANNOT BE APPLIED CONSTITUTIONALLY TO THE PERFORMANCES IN THIS CASE.

The state argues in the alternative that if the performances in this case are constitutionally protected, Indiana's public indecency law still could be applied validly to those performances (Pet. 26).[3] The state advances three fall-back arguments.

First, the state claims that the statute is a law of general applicability and is "content-neutral" so that respondents' dance performances, even if expressive, are not entitled to constitutionally exempt status. Relying on *Baysinger*, the state is of the view that a nude dance performance that conveys only "an emotional theme" amounts to criminal conduct (Pet. Brief at 21), while a nude performance that is judged "to tell a story" or carry an "artistic message" is not (*id.* at 24). The state thus would condemn non-representational nude dance words as criminal. The dividing line between guilt and innocence, under the state's argument, would necessarily depend upon a prosecutor's or judge's subjective judgment that the questioned performance had some sort of

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[3] The state's alternative position seems to contradict directly the holding in *State v. Baysinger*, 272 Ind. 236, 397 N.Ed.2d 580 (1979), *appeals dismissed sub nom., Clark v. State*, 446 U.S. 931 (1979) and *Dove v. State*, 449 U.S. 806 (1980). If this Court determines that the dance performances in this case constitute expressive activity protected under the First Amendment, the public indecency statute could not be constitutionally applied, according to *Baysinger*. 397 N.E.2d at 587.

story line or plot, as opposed to some non-representational subject. Yet these are obvious content-based distinctions.

The state's second argument in reserve is that the statute furthers a substantial governmental interest unrelated to the suppression of free expression. But the gloss placed upon the statute by *Baysinger* ties the operation of the statute directly to the suppression of a particular form of expression. Further, if the state supposes, for example, that there is a direct link between striptease or nude dance performances and prostitution, it failed to demonstrate how a prohibition extending from barroom to theater to bookstore settings would be tied directly to the regulation of prostitution. Instead, the breadth of the prohibition, as interpreted in *Baysinger*, betrays a governmental intent to censor erotica, not to control prostitution.

The state's third contention is that the statute's ban on nudity is a reasonable "manner" restriction, permissible under the Court's decisions that permit reasonable time, place and manner restrictions on protected expression. The flaw here is that the Indiana statute, just like the ordinance in *Doran*, prohibits expressive nude dance performances in all settings under all circumstances throughout the entire state, according to *Baysinger*. It is this operation of the statute, as construed, that noticeably separates it from those adult entertainment regulations otherwise approved by this court in *California v. LaRue*, 409 U.S. 109 (1972) and *Young v. American Mini Theatres*, 427 U.S. 50 (1976).

CONCLUSION

The nude dance performances in this case concededly are not obscene and are unquestionably communicative and expressive. Hence, they are entitled to First Amendment protection. The State of Indiana's attempts to suppress such expression because of the ideas and emotions conveyed, through a public indecency statute, should be rejected and the decision of the United States Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

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